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TO: Flathead County Board of Adjustment

FROM: Erik K. Mack, AICP, Interim Director

DATE: February 15, 2022

RE: Appeal—22-01 Paslawsky, Sands and Heberling

Course of Proceedings

On October 28, 2021, an application was submitted for an Administrative Conditional Use Permit to allow the property located at 1661 Whitefish Hills Drive to be utilized as a short-term rental (FACU-21-89). Adjacent property owner mailing occurred on November 16, 2021, giving notice to nearby property owners of the application. After the comment period ended on December 3, 2021, the applicant was given an opportunity to pay for an after-the-fact permit as it was discovered that the property was already being rented during the public comment period. On December 13, 2021, the applicant submitted additional fees.

After complete review of the permit application, agency comments, public comments, and the applicant's supplemental information address the public comments, a letter for approval and a permit was issued to the applicant on December 16, 2021. The approval was based on the staff report as findings of fact. The staff report, findings of fact and permit are attached.

On January 13, 2022, the applicant submitted an appeal to the approval of FACU-21-89.

Nature of the Appeal

In their application to appeal the decision to approve FACU-21-89, the appellant stated the following reasons for the appeal:

1. "The Zoning Administrator erred in omitting to apply the standard requiring a finding that 'the proposed use will not be determinantal to surrounding neighbors.'"
2. "The zoning administrator erred in arbitrarily and/or unreasonably entering Finding of Fact #5, that 'impacts from noise will be minimal' and that lighting will be typical.'"
3. "The Zoning Administrator erred in apparently applying a 'mitigate impact' standards, which does not appear in the FCZRs. The Zoning Administrator also erred in omitting to 'resolve' impacts on Neighbors."
4. "The Zoning Administrator erred in arbitrarily finding that the site is 'suitable,' omitting to consider that the cabin and its septic field were built in a wetland, where large runoff event would likely leak pollutants onto neighbors' property."

5. "The Zoning Administrator erred in omitting to include in the conditions for the permit, a recitation that the applicant 'is responsible for reviewing and adhering to all covenants, conditions, and restrictions in place.'"
6. "The Zoning Administrator erred in issuing the permit where the VRBO is in violation of the lighting standards."
7. "The Zoning Administrator erred in applying FCZR2.04.020, by omitting to include in the Planning Office form letter of December 20, 2021, any mention that a permit was issued on December 16, 2021. Appellants as recognized, interested parties received no notice of the permit issuance until January 3, 2022, all in violation of appellants right to due process of law."

Analysis

Section 2.04.010 of the Flathead County Zoning Regulations states, "Any person, unit of government or agency may file an appeal when aggrieved by a decision or interpretation by the Zoning Administrator, provided that the appeal is based on an allegation that:

1. The Zoning Administrator made an error in the interpretation of these regulations, and
2. The erroneous interpretation specifically aggrieves the appellant."

The following is an analysis of the arguments made by the appellant and outlined above in this memo as to how the Zoning Administrator erred in the interpretation of the regulations and how the appellants are aggrieved:

1. The appellant allege that the findings of fact do not address that the proposed use will not be determinantal to the surrounding neighbors. Section 2.06.080 (1) (D) of the Flathead County Zoning Regulations (FCZR) discusses Immediate Neighborhood Impact and lists typical negative impacts which extend beyond the proposed site. This list includes; excessive traffic generation, noise or vibration, dust, glare, or heat, smoke, fumes, gas, or odors, and inappropriate hours of operations. Finding number 5 addresses all the criteria listed under Immediate Neighborhood Impact. Therefore, there is a finding of fact that the proposed use will not be detrimental to the surrounding properties.
2. The condition for an emergency contact that is available to be at the property within one hour serves as a first line of defense for any impacts to the neighborhood. Anyone aggrieved by the short-term rental can file a complaint with the planning and zoning office. If a violation is determined to occur on the property, the short-term rental permit could be revoked.

In the analysis by the appellant, they discuss renters having parties while on vacation. The short-term rental housing permit requires no more than 8 guests on-site at one time. This means that if a renter has a party with more than 8 guests the property owner would be a violation of the conditions of approval and could be subject to the permit being revoked.

3. The appellant allege that the report and subsequent findings of fact do not mitigate impacts or discuss mitigation and that the mitigation does not figure into the zoning administrators' decision, specifically noise. The conditions placed on the permit serve to mitigate impacts from noise as discussed above.

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4. The aerial photograph submitted with the appeal shows a riverine wetland that extends from the northern boundary to the southern boundary of the property. The wetland map does not show any other wetlands on the subject property. The same map submitted by the appellant shows the cabin location being approximately 65 feet west of the riverine area. The pond on the subject property is not mapped as wetland as demonstrated in the Wetlands Inventory Map, and the cabin locations sites approximately 30 feet from the edge of the pond. Therefore, the cabin is not located in a mapped wetland as alleged by the appellant.

The Flathead County Planning and Zoning Department does not administer the drainfield setback requirements. Any violation of this setback would likely need to be resolved prior to the issuance of a Public Accommodations License from Environmental Health. The permit is conditioned that 'The proposed use shall be reviewed by the Flathead City-County Department of Environmental Health in order to obtain a State of Montana Public Accommodation License for the short-term rental housing. A copy of the approved license shall be submitted to Flathead County Planning and Zoning prior to the expiration date of this permit.' If the applicant can not provide a copy of the public accommodation license they would be in violation of the conditions of approval.

5. Section 5.11.040 FCZR, "The applicant for Short-term Rental Housing approval is responsible for reviewing and adhering to all Covenants, Conditions and Restrictions in place or any other Homeowner Association documents. Flathead County shall not be responsible for the determination as to compliance with such Covenants, Conditions and Restrictions and shall have no duty to enforce them." The zoning regulations state Flathead County shall not be responsible for the determination as to compliance with such Covenants, Conditions and Restrictions and shall have no duty to enforce them. The CCR's are strictly a civil matter between the short-term rental applicant and the Homeowners association. The county does not condition that the short-term rental applicant is responsible for reviewing and adhering to all covenants, conditions, and restrictions in place as this would make the County responsible for the applicant's compliance with the CCR's.
6. Section 5.12.020 FCZR states, "All porch and yard lighting shall be hooded, screened or directed in a manner such that the light source or the diffuser emitting the light shall not be deleterious to the adjoining property owners or occupants." The property is heavily wooded, and the structures are located in the center of a 20-acre site. Staff conducted a site visit prior to issuing a permit and determined that the lighting appeared to be in compliance with Section 5.12.020.

If there are flood lights that point towards the neighbor's property and are obnoxious as stated in the appeal, the applicant can file a complaint with the planning office and the code compliance officer would do an investigation to determine if the light is violation of Section 5.12.020. If the flood light was determined to be a violation the property owner would be required to fix the violation as per Condition number 11 listed on the permit.

7. Section 2.04.020 FCZR contains the appeal process for Any person, unit of government or agency may file an appeal when aggrieved by a decision or interpretation by the Zoning Administrator. 2.04.020 (1) FCZR states, "Appeals must be filed in the manner provided, and after payment of fees within 30 days from the time the officer charged with enforcement of

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these regulations has made a written interpretation or determination of these regulations.” The permit was issued December 16, 2021, and the appeal was filed on January 13, 2022, within the 30-day timeframe. The zoning regulations do not require that neighbors be notified after a permit is issued only that they are notified of the application and given a minimum of 15 days to comment.

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